

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 21, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1378-CR

Cir. Ct. No. 2012CF510

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL J. GANDY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Daniel Gandy appeals from a judgment convicting him of second-degree sexual assault of a child under sixteen years old and from a postconviction order denying his motion (1) seeking sentence modification due to a new factor or (2) resentencing because the circuit court relied upon inaccurate

information. We agree with the circuit court that Gandy neither demonstrated a new factor nor established grounds for resentencing. We affirm.

¶2 The complaint provided the factual basis for Gandy’s no contest plea to second-degree sexual assault of a child. Gandy, who was living with the victim’s family, engaged in sexual intercourse with the victim (penis to mouth) and compelled the victim to don items Gandy found sexually arousing.

¶3 At sentencing, the court considered the severity of the crime (a forty-year felony), Gandy’s character, likelihood of reoffending and rehabilitation needs, the need to protect the public, the presentence investigation report, the impact on the victim, and the COMPAS¹ evaluation. While the court acknowledged that the COMPAS stated that Gandy posed a low risk to reoffend, the court found that other aspects of Gandy’s profile suggested that he actually posed a greater risk to reoffend. These aspects included the severity of the crime, Gandy’s character, lack of stability, mental health issues and treatment needs, and the manner in which Gandy breached the trust of the victim and the victim’s family. The court imposed a fifteen-year sentence.

¶4 Postconviction, Gandy obtained a psychosexual evaluation. The psychosexual evaluator concluded that Gandy presented a low to medium risk to reoffend. Gandy contended that this evaluation constituted a new factor requiring sentence modification. In addition, Gandy sought resentencing because the circuit court relied upon inaccurate information at sentencing. After an evidentiary

¹ COMPAS stands for “Correctional Offender Management Profiling for Alternative Sanctions.” *State v. Samsa*, 2015 WI App 6, ¶1 n.1, 359 Wis. 2d 580, 859 N.W.2d 149 (2014).

hearing, the circuit court rejected Gandy's challenges to his sentence. Gandy appeals.

¶5 In order to have sentence modification due to a new factor, the defendant must demonstrate the existence of a new factor by clear and convincing evidence. *State v. Harbor*, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is

a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

Id., ¶40 (citation omitted). Whether a new factor exists is a question of law that we review de novo. *Id.*, ¶36.

¶6 The focus of Gandy's new factor claim was the psychosexual evaluator's postconviction conclusion that he posed a low to medium risk to reoffend, and he should receive sex offender treatment in a community setting.

¶7 At the postconviction motion hearing, the circuit court determined that the psychosexual evaluator's opinion did not constitute a new factor because the evaluation, unknown at the time of sentencing, would not have been highly relevant to the imposition of sentence. Of particular interest to the circuit court was the evaluator's opinion that certain of Gandy's attitudes about sexual behavior increased his risk to reoffend. The court questioned whether the evaluator, in rendering an opinion that Gandy presented a low to medium range risk, had adequately considered these attitudes. More importantly and dispositively, the court found that the evaluator's opinion did not take into account all of the sentencing objectives and factors which a sentencing court is obligated to consider

in the exercise of its sentencing discretion.² The court concluded that Gandy did not show the existence of a new factor.

¶8 We agree with the circuit court that Gandy did not establish a set of facts “highly relevant” to sentencing. *Id.*, ¶40. The circuit court was charged with conducting an individualized sentencing, *State v. Holloway*, 202 Wis. 2d 695, 699-700, 551 N.W.2d 841 (Ct. App. 1996), based upon the sentencing factors and objectives, *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The weight of the sentencing factors was for the circuit court to decide. *State v. Steele*, 2001 WI App 160, ¶10, 246 Wis. 2d 744, 632 N.W.2d 112. The circuit court was not obligated to accept the opinions expressed in the presentence investigation report, the COMPAS instrument, or the postconviction psychosexual evaluation. See *State v. Samsa*, 2015 WI App 6, ¶13, 359 Wis. 2d 580, 859 N.W.2d 149 (2014).

¶9 The circuit court’s sentencing rationale undermines Gandy’s claim that the psychosexual evaluation was highly relevant to sentencing. As previously stated, the court considered the severity of the crime (a forty-year felony), Gandy’s character, likelihood to reoffend and rehabilitation needs, the need to protect the public, the presentence investigation report, the impact on the victim, and the COMPAS evaluation. The court did not place great weight on the psychosexual evaluator’s opinion that Gandy posed a reduced risk to reoffend. Gandy did not

² In his reply brief, Gandy complains that the circuit court misunderstood the evaluator’s reference to the risk posed by Gandy’s attitudes about sexual behavior. Even if Gandy is correct, which we need not decide, the circuit court rightly noted that the evaluator’s opinion did not touch on all of the factors and objectives that are part of a circuit court’s exercise of sentencing discretion.

establish by clear and convincing evidence that the postconviction psychosexual evaluation was highly relevant to sentencing.

¶10 We turn to Gandy's second appellate issue. Gandy sought resentencing because the circuit court relied upon inaccurate information when it considered the COMPAS criminogenic needs section to find that he has a higher likelihood to reoffend even though the COMPAS risk assessment section placed his likelihood to reoffend at low to moderate. This very argument was rejected in *Samsa*. *Id.*, ¶11. The COMPAS is but one tool available to the circuit court at sentencing. *Id.*, ¶13. A circuit court may, in the exercise of its sentencing discretion, reject a COMPAS risk assessment and rely upon other aspects of the COMPAS in fashioning an individualized sentence. *See id.* The circuit court's use of the COMPAS did not violate Gandy's due process right to be sentenced based upon accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

